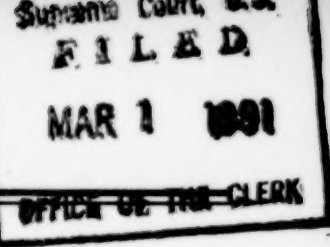


4  
No. 90-762



IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1990

THOMAS FREYTAG, ET AL.,

*Petitioners,*

v.

COMMISSIONER OF INTERNAL REVENUE,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE FIFTH CIRCUIT

**JOINT APPENDIX**

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March 1, 1991

Petition for Writ of Certiorari Filed Nov. 13, 1990  
Writ Granted Jan. 22, 1991

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**UNITED STATES TAX COURT**

**RELEVANT DOCKET ENTRIES\***

**DOCKET NO. 4934-82**

**THOMAS L. FREYTAG AND SHARON N. FREYTAG**  
**PETITIONER,**

**v.**

**COMMISSIONER OF INTERNAL REVENUE,**  
**RESPONDENT.**

<u>Date</u>	<u>Filings and Proceedings</u>	<u>Action</u>	<u>Date Served</u>
Mar. 3, 1982	Petition Filed. Fee Paid.		Mar 4, 1982
June 1, 1984	ORDER that Dkt. Nos. 4934-82, 9307-82, 29012-82, 1240-83, 3250-83, 8616-83, 204-84, 3749-84, 7658-84, and 11821-84 are consolidated for discovery, trial, briefing, and opinion. The place of trial is San Francisco, CA and jurisdiction is retained by this division of the Court. (Judge Wilbur) Further, ORDER that the cases are calendared for trial at a Special Session Nov 27, 1984 at San Francisco, CA.		Jan 1, 1984

\*Docket entries are presented for the initial petition filed by the Freytags. Entries for the other consolidated test cases are identical.

<u>Date</u>	<u>Filings and Proceedings</u>	<u>Action</u>	<u>Date Served</u>
Jun 19, 1984	HEARING at Atlanta, GA before Judge Wilbur		
Sept 7, 1984	HEARING at Atlanta, GA before Judge Wilbur		
Sept 27, 1984	HEARING at New York, NY before Judge Wilbur		
Oct 10, 1984	HEARING at Washington, D.C. before Judge Wilbur		
Oct 25, 1984	HEARING at Washington, D.C. before Judge Wilbur		
Nov 28, 29, Dec. 3, 5, 6, 7, 10-14, 17, 1984	PARTIAL TRIAL at San Francisco, CA before Judge Wilbur.		
Aug. 1, 1985	HEARING at Washington, DC before Judge Wilbur		
Nov. 4, 5, 1985	PARTIAL TRIAL at Washington, DC before Judge Wilbur.		
Nov 19, 1985	ORDER that case is assigned to S.T. Judge Powell for purposes of conducting further trial on Dec 2, 1985		

<u>Date</u>	<u>Filings and Proceedings</u>	<u>Action</u>	<u>Date Served</u>
Dec. 2, 3, 4, 5, 6, 9, 10, 11, 12, 16, 17, 18, 19, 20, 1985	PARTIAL TRIAL at Washington, D.C., before S.T. Judge Powell.		
Jan. 21, thru 24, 27 thru 31, 1986	FURTHER TRIAL at Washington, DC before S.T. Judge Powell. Continued--See Order		
Mar 3, 4, 5, 1986	HEARING at Washington, D.C. before S.T. Judge Powell.		
Mar 24, 25, 26, 27, 1986	FURTHER TRIAL at Washington, DC before S.T. Judge Powell.		
Apr. 28, 29, 30, May 1, 2, 1986	PARTIAL TRIAL at Washington, DC before S.T. Judge Powell.		
May 20, 21, 22, 1986	TRIAL at San Francisco, CA before S.T. Judge Powell. Continued for		

<u>Date</u>	<u>Filings and Proceedings</u>	<u>Action</u>	<u>Date Served</u>
	further trial--SEE ORDER dated May 28, 1986		
May 28, 1986	ORDER that this case is continued for further trial to a Special Session on Jun 9, 1986 at Wash- ington, DC.		Jun 2, 1986
Jun 9 thru 12 1986	FURTHER TRIAL at Washington, DC before S. T. Judge Powell.  (SEE ORDER 10-21-87) SUBMITTED TO S. T. JUDGE POWELL		
Jul 23, 1986	NOTICE of Proposed reassignment. Any motions re: this notice should be filed by Aug 25, 1986.		Aug 4, 1986
Sep 9, 1986	MOTION by Petr at 14965-83 for leave to file Memorandum In Opposition to reassign- ment of cases out of time (Memorandum in Oppo- sition Lodged)	Granted Sep 15, 1986	Sep 18, 1986
Sep 15, 1986	MEMORANDUM in Opposition by Petr. at 14965-83 to reassign- ment of cases		Sep 18, 1986

<u>Date</u>	<u>Filings and Proceedings</u>	<u>Action</u>	<u>Date Served</u>
Sep 16, 1986	ORDER that Petr at 14965-83 file by Oct 3, 1986 a Memorandum		Sep 18, 1986
Oct 3, 1986	MEMORANDUM by Petr. at 14965-83 In Support of Objection to Proposed Reassignment (c/s 10-2-86)		
Oct 10, 1986	ORDER that case is set for hearing re: reassign- ment of cases on Oct 27, 1986 at Special Session at Washington, D.C.		Oct 10, 1986
Oct 27, 1986	HEARING at Washing- ton, DC before S. T. Judge Powell. Hearing held on Proposed reas- signment filed 7-23-86. Record held open to 11- 10-86 for stipulation as to proposed reassign- ment.		
Nov 5, 1986	ORDER that case is no longer assigned to Judge Wilbur and is assigned to S. T. Judge Powell (See Order 10-21-87)		Nov 12, 1986
Nov 17, 1986	STIPULATION in all cases except 14965-83. (File Per Judge)		



<u>Date</u>	<u>Filings and Proceedings</u>	<u>Action</u>	<u>Date Served</u>
Feb 5, 1987	ORDER that 14965-83 is severed from consolidation		Feb 10, 1987
Jun. 22, 1987	STIPULATION re: re-assignment to S. T. Judge Powell (File per Judge) (See ORDER 10-27-87)		
Oct 21, 1987	ORDER case is reassigned to Judge Sterrett OPINION, Judge Sterrett. 89 T.C. No. 6 (Adopting the Opinion of S. T. Judge Powell) (Decision will be entered under Rule 155)		Oct 21, 1987
Oct 27, 1987	ORDER case reassigned to S. T. Judge Powell		Oct 28, 1987
Oct 30, 1987	ORDER, opinion filed 10-21-87 is herein amended		Nov 3, 1987
Jan 4, 1988	MOTION by Petr. to reconsider opinion (P.M. timely)	Jan 7, 1988	Jan 12, 1988
Jul 7, 1988	ORDER Petrs. motion filed 1-4-88 is denied		Jul 11, 1988

<u>Date</u>	<u>Filings and Proceedings</u>	<u>Action</u>	<u>Date Served</u>
Aug 30, 1988	MOTION by Petr. for reconsideration of Opinion	See Order Nov. 3, 1988	Sep 2, 1988
Nov 3, 1988	ORDER motion filed 8-30-88 is denied. Parties by 12-5-88 file Rule 155 documents		Nov 4, 1988
Mar 10, 1989	DECISION ENTERED, Judge Nims.		Mar 10, 1989

**UNITED STATES TAX COURT**

Washington, D. C. 20217

THOMAS L. FREYTAG AND	)	<u>First Western Govern-</u>
SHARON N. FREYTAG, ET AL.,	)	<u>ment Securities Inc.</u>
Petitioners,	)	<u>Cases</u>
v.	)	
COMMISSIONER OF IN-	)	Docket Nos. 4934-82
TERNAL REVENUE,	)	9307-82
Respondent.	)	27146-82
		29012-82
		1240-83
		3250-83
		8616-83
		14965-83
		33016-83
		204-84
		3749-84
		7658-84
		11821-84

NOTICE OF PROPOSED REASSIGNMENT

Judge Richard C. Wilbur, to whom the above-captioned cases were assigned and before whom these same cases were partially tried, retired as an active judge on the Court due to physical disability and immediately assumed senior status, effective April 1, 1986. By direction of the Chief Judge, Special Trial Judge Carleton D. Powell completed the trial of these cases. This will serve as notice to the parties that these cases will be reassigned to Special Trial Judge Carleton D. Powell for purposes of preparing the report pursuant to Rule 183 of this Court's Rules. It is further contemplated that all other cases involving the same issue, which are presently assigned

to Judge Wilbur, will be reassigned to Special Trial Judge Powell.

If any motions are contemplated with respect to this reassignment, they should be filed on or before August 25, 1986. If no motions are received by the Court by that date these cases will be reassigned to Special Trial Judge Powell and pursuant to Rule 183(c) of the Court Rules, action on this report will be taken by Judge Wilbur, or if not by this Division of the Court.

Samuel B. Sterrett  
Chief Judge

Dated: Washington, D. C.  
July 23, 1986

**TROUTMAN, SANDERS, LOCKERMAN & ASHMORE**

A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

**ATTORNEYS AT LAW**

ONE RAVINIA DRIVE

SUITE 1600

ATLANTA, GEORGIA 30346

404 / 650-5000

ROBERT M. FINK, P.C.

August 14, 1986

The Honorable Samuel B. Sterrett

Chief Judge

United States Tax Court

400 Second Street, N.W.

Washington, D.C. 20217

Re: Freytag, et al v. Commissioner

Dear Judge Sterrett:

During our last two conferences regarding the options available to the petitioners, you have agreed to review the decision by Judge Powell in the event Judge Wilbur would not be able to review the decision. You agreed to review the decision in order to alleviate the concern of the petitioners as to the uncertainty of a judge being assigned to review the decision several months after the petitioners agreed to go forward.

As I mentioned to you during our last meeting on July 22, 1986, the attorneys for the test case petitioners consider the agreement by you to review the decision in the event Judge Wilbur is not available, an important element of the agreement to go forward. Accordingly, counsel have represented to their

clients, including the test case petitioners and other First Western Government Securities petitioners, that this is the procedure that the Court has agreed to.

The Notice of Proposed Reassignment dated July 23, 1986, indicated that if Judge Wilbur were not available to review the decision by Judge Powell, action would be taken "by this Division of the Court". We are assuming that such statement is intended to provide for your review of the decision. If we are incorrect in our assumption, I therefore respectfully request that the Notice of Proposed Reassignment be amended to reflect our agreement.

Very truly yours,

/s/ \_\_\_\_\_  
Robert M. Fink

RMF:rm

cc: Steve Miller, Esquire

Test Case Attorneys

Richard Sideman, Esquire



**UNITED STATES TAX COURT**  
WASHINGTON, D.C. 20217

THOMAS L. FREYTAG AND	)	Docket Nos. 4934-82
SHARON N. FREYTAG, ET AL.,	)	9307-82
Petitioners,	)	27146-82
v.	)	29012-82
COMMISSIONER OF IN-	)	1240-83
TERNAL REVENUE,	)	3250-83
Respondent.	)	8616-83
		14965-83
		33016-83
		204-84
		3749-84
		7658-84
		11821-84
		First Western Govt.

**ORDER**

Upon due consideration and pursuant to Rules 180 et seq., and for cause, it is

ORDERED that these cases are no longer assigned to Judge Richard C. Wilbur. It is further

ORDERED that these cases are assigned to Special Trial Judge Carleton D. Powell for trial or other disposition.

(Signed) SAMUEL B. STERRETT  
Chief Judge

Dated: Washington, D.C.  
November 5, 1986

**UNITED STATES TAX COURT**

THOMAS L. FREYTAG AND	)	<u>First Western Govern-</u>
SHARON N. FREYTAG, ET AL.,	)	<u>ment Securities Inc.</u>
Petitioners,	)	
v.	)	Docket Nos. 4934-82
COMMISSIONER OF IN-	)	9307-82
TERNAL REVENUE,	)	27146-82
Respondent.	)	29012-82
		1240-83
		3250-83
		8616-83
		33016-83
		204-84
		3749-84
		7658-84
		11821-84

**STIPULATION**

Petitioners and respondent in this proceeding hereby stipulate that each petitioner and respondent, respectively, waive any claim they have under Rule 63 of the Federal Rules of Civil Procedure with respect to reassignment of the above-captioned case to Special Trial Judge Carleton Powell upon the resignation from the Tax Court of Judge Richard C. Wilbur.

WILLIAM J. NELSON  
Internal Revenue Service  
Chief Counsel

By: \_\_\_\_\_  
STEPHEN M. MILLER,  
Special Litigation Counsel  
Room 3547  
1111 Constitution Ave., N.W.  
Washington, DC 20204

Dated: June 22, 1987

By: \_\_\_\_\_  
ROBERT M. FINK  
Troutman, Sanders, Lockerman  
& Ashmore  
One Ravinia Drive, Suite 1600  
Atlanta, GA 30346  
Counsel on Behalf of the Test  
Case Petitioners

Dated: June 18, 1987

**UNITED STATES TAX COURT**  
Washington, D.C. 20217

THOMAS L. FREYTAG AND	)	Docket Nos. 4934-82
SHARON N. FREYTAG, ET AL.,	)	9307-82
Petitioners,	)	27146-82
v.	)	29012-82
COMMISSIONER OF IN-	)	1240-83
TERNAL REVENUE,	)	3250-83
Respondent.	)	8616-83
		33016-83
		204-84
		3749-84
		7658-84
		11821-84

ORDER

For cause, it is

ORDERED that this case is reassigned to the undersigned  
for disposition.

/s/ \_\_\_\_\_  
Samuel B. Sterrett  
Chief Judge

Dated: Washington, D. C.  
October 21, 1987

**UNITED STATES TAX COURT**  
Washington, D.C. 20217

THOMAS L. FREYTAG AND	)	Docket Nos. 4934-82
SHARON N. FREYTAG, ET AL.,	)	9307-82
Petitioners,	)	27146-82
v.	)	29012-82
COMMISSIONER OF IN-	)	1240-83
TERNAL REVENUE,	)	3250-83
Respondent.	)	8616-83
		33016-83
		204-84
		3749-84
		7658-84
		11821-84

FIRST WESTERN  
GOVERNMENT  
SECURITIES, INC.

ORDER

Upon consideration of petitioners' Motion for Reconsideration, filed January 4, 1988, and pursuant to the Memorandum Sur Order of Special Trial Judge Carleton D. Powell, attached hereto and served herewith, which the undersigned hereby adopts, it is

ORDERED that petitioners' Motion for Reconsideration is denied.

Arthur L. Nims, III  
Chief Judge

Dated: Washington, D.C.  
July 7, 1988.

**UNITED STATES TAX COURT**  
WASHINGTON, D.C. 20217

THOMAS L. FREYTAG AND	)	Docket Nos. 4934-82
SHARON N. FREYTAG, ET AL.,	)	9307-82
Petitioners,	)	27146-82
v.	)	29012-82
COMMISSIONER OF IN-	)	1240-83
TERNAL REVENUE,	)	3250-83
Respondent.	)	8616-83
		33016-83
		204-84
		3749-84
		7658-84
		11821-84

FIRST WESTERN  
GOVERNMENT  
SECURITIES, INC.

ORDER

For the reasons stated in the Memorandum Sur Order of Special Trial Judge Carleton D. Powell, attached hereto and served herewith, which we adopt, it is

ORDERED that petitioners' Motion for Reconsideration of Opinion, filed August 30, 1988, is denied. It is further

ORDERED that the parties shall file decision documents under Rule 155 on or before December 5, 1988.

/s/ \_\_\_\_\_  
Arthur L. Nims, III  
Chief Judge

Dated: Washington, D.C.  
November 3, 1988.